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## MAY AN ESTATE BE DEPRIVED OF ITS USUAL INCIDENTS AT THE WILL OF THE CREATOR?

It is proposed in this paper to examine the development of the legal doctrine by which the owner of an estate, whether large or small, may hold the property free from those incidents which usually attend the ownership of such estate. It will be useful to preface this investigation by a statement of the various kinds of freehold estates, with their incidents.

*A.* Estates in fee simple and absolute interests in personalty. The usual incidents of the ownership of such estate may be classified as follows: (1) The power to alienate; (2) the power to will; (3) devolution under the intestate laws, in case the owner does not dispose of the estate in his lifetime or by will; and (4) the liability for debts.

*B.* Estates in fee tail. The only incidents with which we are concerned are (1) power to commit waste, and (2) power to bar the entail by fines and common recoveries.

*C.* Estates for life. The important incidents are: (1) the power to alienate; (2) forfeiture for waste; and (3) liability for debts.

(Estates for years are not separately classified because,

so far as our purpose is concerned, they are governed by the same principles as estates for life.)

This table is not intended as an exhaustive classification of the incidents of estates. All that is intended to be expressed by it is that, in the absence of any restrictive clause in the instrument creating any one of these estates, it will have attached to it by law the incidents mentioned. The problem that then arises is: How far may the creator of an estate by express provision detach from the estate created all or any of the incidents mentioned?

The earliest statement of the law is found in Lit. § 360. "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." § 361: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." § 362: "Also, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, etc., such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the statute of W. 2, Cap. 1, was made, by which statute estates in tail are ordained." The effect of the doctrine of common recoveries upon the latter proposition is thus stated in Co. Litt. 223 b.: "But as to a common recovery the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said statute of W. 2. And therefore such condition is repugnant to the estate tail." And on the same page, Lord Cope expresses his opinion about similar restrictions upon the lesser estates: "As if a man make a lease for life or years upon condition that they shall not grant over the

estate or let the land to others, this is good, and yet the grant or lease should be lawful." It is noticeable in this earliest statement of the law that no distinction is taken between forfeiture upon alienation and restraints upon alienation; the illustrations are so concise that it is difficult to understand whether they are examples of forfeiture or simply of restraint; but in any event it is clear that Littleton's objection is the same to (1) an estate in fee to A., with the proviso that if he attempt to alienate, the estate shall vest in B., and to (2) an estate in fee to A., with a proviso that he shall have no power to alienate it.

It would have been the simplest way to deal with such conditions as are suggested above to say that they are void, because they are repugnant to the estate granted: that one cannot in one breath give A. an estate in fee simple and in the next say that he shall not have the ordinary powers of an owner in fee simple—that such a condition is repugnant to the estate granted, and therefore void. And Pearson, J., in *Re Rosher*, 26 Chan. Div. 801 (1884), goes so far as to say: "I confess I wish the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion." Certainly there would have been no uncertainty and no confusion, and the courts would have been saved the solution of many nice questions, but it does not follow that the law would have been more beneficial. In law, as in morals, the easiest course is by no means necessarily the best; if simplicity is the only argument in favor of the repugnancy rule, it were wiser to revise the present list of various kinds of estates, and add to it, for example, subdivisions of estates in fee simple, in one of which a man might hold without power to alienate it, in another without liability for his debts, etc.

In fact, the authorities, from Littleton to the present time, are agreed that the repugnancy theory, though the simplest, is not the true one; that an estate may be created without the owner having all the usual powers of the possessor of such an estate. Indeed, it might as well be argued that, because an owner in fee simple has the natural right to erect any building upon his land and use it as he chooses, provided

he complies with the police laws of the state and does not create a nuisance to his neighbor, it would be repugnant and illegal to insert in a deed creating an estate in fee simple a condition that the grantee should not erect a factory upon the premises granted; and yet, of course, it is well settled that such a condition is valid and binding, not only on the grantee, but on his assigns. It is not true that such a grant contradicts itself; the grantor does not first give a power and then take it away, but on the contrary he never intends to confer upon the grantee the power to erect a factory. And precisely the same argument applies where the condition is that the grantee shall not alienate; if the condition is to be held void, it must be upon some other ground than that the grantor has contradicted himself. Littleton's own illustration of a condition in partial restraint of alienation being good shows that the courts will recognize the power of a grantor to deprive the estate in the hands of his grantee of certain of its usual legal incidents. The question then arises, how far may this be done?

It is submitted that the only principle, if it may be called a principle, which governs such restrictions is public policy, which is nothing more than the effort of the courts to apply to the facts of a given case those principles of morality which, though not embodied in statutes, are nevertheless recognized as legally binding in the community. If it be objected that this implies the power of judges to make the law, whereas their province is to interpret it, it may be replied that this power is the distinguishing and crowning feature of our common law, as opposed to those systems of law which are embodied in codes whose existence implies the non-existence, or at least the abolition, of any principle not contained therein. In the field of contract law, a dozen illustrations might be given of agreements which though not forbidden by statute (at least originally) are yet forbidden or descimaged, in various degrees, by the courts; such are those in restraint of marriage, *Lowe v. Peers*, 4 Burr. 2225, by a mortgagor to waive his equity of redemption; *Newcomb v. Bonham*, 1 Vern. 7, agreements to restrict the liability of a common carrier, (which, of course, are sustained in some jurisdictions), wager-

ing contracts, *Wilkinson v. Tousley*, 16 Minn. 299; agreements tending to encourage litigation, as maintenance, *Findon v. Parker*, 11 M. & W. 682, or champerty, *Prosser v. Edmonds*, 1 Y. & C. 499. Nor is this judicial legislation confined to contract law. The history of the Rule against Perpetuities, whose domain is the law of real property, is the most striking example of its extent in the whole realm of law. Suggested by Lord Nottingham, contrary to the opinion of all the law judges, in Duke of Norfolk's case, 3 Ch. Cas. 1, extended to the case of infants in *Stephens v. Stephens*, Cas. temp. Talb. 228, and to a child *en ventre sa mere*, in *Long v. Blackall*, 7 T. R. 100, and to any number of lives in being in *Thelluson v. Woodford*, 11 Ves. 112; adding a fixed period of twenty-one years regardless of infancy, in *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25, and taking its final modern shape in *Cadell v. Palmer*, 1 Cl. & F. 372, the Rule against Perpetuities has not only earned an admitted place among the principles of real property law, but its value in prohibiting the indefinite tying up of real estate is admitted by every one. Nay, coming closer home, we find that the same objections which have been made by the courts to contracts have been made to conditions embodying the same idea when annexed to grants of real estate. In *Brown v. Peck*, 1 Eden 140, the testator annexed to a gift to his niece a condition that it should be cut down if she lived with her husband. The condition was disregarded as void. So also *Wren v. Bradley*, 2 De G. & S. 49. Evidently, therefore, the question how far an estate may be deprived of its usual legal incidents is simply one of public policy; or, as Pearson, J., says in *Re Rosher supra*: "It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether all considerations of repugnancy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to one particular individual was always held, to be good, so, in the same way, although a restraint of alienation in general was decided to be bad, it seems

to have been thought that a restraint of alienation to one individual or his issue was not bad." Let us now examine the authorities to see how far the courts have permitted legal incidents to be detached from the various estates.

Let us dispose of the simplest questions first, regardless of the usual order of the various estates. It is, of course, familiar that the creator of a life estate, may, if he be so minded, relieve the life tenant from all liability for waste; in fact, the doctrine of equitable waste, or the imposition upon the tenant for life without impeachment of waste, of certain duties to the remainderman with respect to the preservation of the property is one of the recent illustrations of judicial legislation. See *Vane v. Barnard*, 3 Vern. 738; *Rolt v. Somerville*, 2 Eq. Cas. Ab. 759; *Lushington v. Boldero*, 15 Beav. 1, and *Turner v. Wright*, 2 De G. F. & J. 234. The reason is clear. The public has no interest, or at least only a very remote one, in the question whether a life tenant may commit waste; if he were owner in fee simple, of course he could destroy *ad libitum*, and, consequently, if the creator of his estate chooses to give him such right, as the public is indifferent, the remainderman cannot object, because he only takes what the testator's bounty gives him. If this is a correct statement of the principle, it would seem to follow (though I know of no authorities) that (1) the creator of the estate might, if he chose, relieve his life tenant from liability for equitable waste also; and (2) the creator of an estate tail might, if he chose, render the tenant in tail liable to remaindermen for waste.

On the other hand, it is well settled that, although prior to the Statute de Donis a condition against alienation by a tenant in tail was valid, *Anonymous Case*, 1 Leon. 292, yet since the statute, the policy of the law has changed, its purpose now is to encourage the freedom of property, various methods of barring entails have been devised, and such a condition is therefore invalid: *King v. Burchell*, Amb. 379. So, as Lord Coke said in the passage above quoted, a condition that tenant in tail should not suffer a common recovery is invalid, and for precisely the same reason. Indeed, it is just as obvious that the public is interested in having land freely alienable, as that the public is not interested in whether a life tenant may commit waste.

This brings us naturally to a condition that tenant in fee simple (or absolute owner of personalty) may not alien, and of course, if the policy of the law requires that tenant in tail may convert his estate into a fee simple so that he may alienate, it also requires that the tenant in fee cannot be restricted generally from alienating: *Ware v. Cann*, 10 B. & C. 433; *Shaw v. Ford*, 7 Ch. Div. 669; *Re Dugdale*, 38 Ch. Div. 176. Same rule as to absolute ownership of personalty: *Bradley v. Peixoto*, 3 Ves. 324; *Doe d. Norfolk v. Hawke*, 2 East. 481. There is one important exception, viz., that a married woman may have an equitable fee in property settled to her sole and separate use, and yet be deprived of the power to alienate her interest. Here the public interest in having property freely alienable yields to what the law regards as the more important consideration that the wife may enjoy the benefit of her separate estate free from the interference of her husband: *Baggett v. Meux*, 1 Phil. 627; *Wells v. McCall*, 64 Pa. 207.

When we leave estates of inheritance, however, and descend to estates for life (or for years), we find both a change in the policy of the law and (for the first time) a distinction between forfeiture and restraint upon alienation. In accordance with the foregoing principles we find that a proviso that a life tenant may not alienate his interest is invalid, *Brandon v. Robinson*, 1 Rose 197; *Halme v. Hutchinson*, 159 Pa. 133; *Ehrisman v. Sener*, 162 Pa. 577 (with, of course, an exception as to a married woman, *Jackson v. Hobhouse*, 2 Mer. 483); yet, on the other hand, it is equally well settled that a gift over upon alienation of a life tenant, or a gift to a tenant until he die or alienate, is good, *Rochford v. Hackman*, 9 Hare 475. It is submitted that this distinction is not a sound one. If the policy of the law is in favor of allowing every freehold tenant to enjoy the power of alienating his estate, then the law ought to hold invalid a provision like that in *Rochford v. Hackman*, *supra*, forfeiting his estate for alienation; if, on the other hand, the public welfare will not be injured by preventing tenant for life from alienating (as, of course, a tenant for years may be prohibited from assigning), then it is hard to see why, in *Brandon v. Robinson*, *supra*, the property should not be tied up in the life tenant's hands, as well as forfeited upon his

attempt to alienate. The law as it stands seems illogical. As to which of the two logical views should be adopted, some light is thrown by the cases which discuss the question how far a man may settle property of his own, reserving a life interest, with a proviso that if he alien, his interest shall terminate. In *Phipps v. Ennismore*, 4 Russ. 131, such provision was held invalid, on the ground that it is an attempt to invalidate one's own subsequent conveyance, and of course this principle, if correct, would not assist our decision. In *Brooke v. Pearson*, 27 Beav. 181, the provision was held valid, because it happened that the subsequent mortgagee was not injured; the decisions are reconcilable on the ground that such a provision is valid unless it injures the life tenant's own grantee. But in *Knight v. Browne*, 30 L. J. N. S. Ch. 649, Wood, V. C., expressly held such proviso valid. Finally, in *Re Pearson*, 3 Ch. Div. 807, such a proviso was held invalid, *Knight v. Browne* being distinguished on the ground that the gift over to the wife was part of a marriage settlement, but the decision is the less satisfactory, because the condition also included a forfeiture upon the life tenant's insolvency, and the court held that it operated as a fraud upon his creditors. The point is evidently unsettled. Evidently, however, the cases just cited assume that the restriction upon alienation by life tenant, if created by a stranger, would be held valid, and on the whole, this seems the sounder view. It is aided by the admitted rule that the lessee for years may be prohibited from alienating, and if no practical inconvenience has resulted from this, it is likely that none will from applying the same prohibition to a tenant for life. As to the case of the tenant for life having created his own estate, the cases can perhaps be reconciled by holding that such an arrangement is legally unobjectionable, *Brooke v. Pearson*, *supra*, especially in favor of a wife, *Knight v. Browne*, *supra*, unless its effect is to defeat either the tenant's own grantee, *Phipps v. Ennismore*, *supra*, or his creditors, *Re Pearson*, *supra*; practically the exceptions will prove so numerous that it would do no damage to admit the existence of the rule.

Perhaps the present is the most appropriate opportunity to advert to the question whether in this whole class of cases



there is any distinction between conditions and limitations. So far as conditions subsequent are concerned, there is apparently no distinction; a gift to A. and his heirs, until he alienate, and a gift to A. and his heirs with a proviso that if he alienate, then to B. and his heirs, are precisely equivalent. A. takes an absolute estate in fee simple in either case. But suppose the illegal condition is precedent, as a gift to A. and his heirs, provided he will live apart from his wife, or a gift to A. and his heirs, so long as he lives apart from his wife. In *Re Moore*, 39 Ch. Div. 116, held that under such a limitation as the latter, A. would not hold, except during such time as he lived apart from his wife, and yet, of course, the policy of the law is just as much infringed upon as in the former case, where evidently the condition would be disregarded, *Brown v. Peck*, *supra*. The decision in Moore's case is, however, probably right; it seems impossible, as Kay, J., points out, for the court to allow the beneficiary to take during the very period when the testator has forbidden it; it would be both an extension of his gift, and a hardship on the person who would take by default. The obvious difficulty of these cases, however, need not concern us. In the nature of things the attempt to limit the incidents of an estate must necessarily be in legal effect an estate with condition subsequent, and in the case of such conditions, as we have seen above, the difficulty does not arise. The distinction will, therefore, not be further noticed.

Turning from general restraints on alienation to partial restraints, we find the law to be in a state of confusion. In *Doe d. Gill v. Pearson*, 6 East 173, real estate was devised by a testator to his two daughters, Ann and Hannah, in fee "upon this special proviso and condition, that in case my said daughters Ann and Hannah Collett, or either of them shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them except to her sister or sisters, or to their children." Ann died without having had any issue, but having shortly before her death levied a fine to the use of her husband, Wait. Lord Ellenborough held, in a somewhat unsatisfactory opinion, that the fine was invalid, as she had no power to alienate to her

husband; he relied upon *Daniel v. Ubley*, Jones 137, where a devise "To a wife to dispose at her will and pleasure, and to give to which of her sons she pleased" was thought by a majority of the court to pass a fee simple with a valid condition attached; but it was not necessary to decide the point. The case, if good law, goes a long way in sustaining partial restraints, as there were but two or three persons in existence to whom under the terms of the gift Ann could alienate. In *Attwater v. Attwater*, 18 Beav. 330, a gift in fee was conditioned, "if sold at all it must be to one of his brothers hereafter named." The condition was held invalid on the ground of repugnancy, and because if such a restraint were permitted it might readily be employed to evade the prohibition against alienation generally. But in *Re Macleay*, L. R. 20 Eq. 186, Jessel, M. R., held valid a condition that the devisee "never sells it out of the family," holding that a condition in partial restraint of alienation was valid, and distinguishing *Attwater v. Attwater*, *supra*, on the ground that the court thought the restraint in that case equivalent to a general restraint. In *Re Rosher* 26 Ch. Div. 801, a devise was made in fee, with a condition that if the devisee desired to sell, the testator's widow should have the option to buy at a price which was so low that the court thought it equivalent to a general restraint upon alienation, or at any rate to a restraint compelling a sale to a particular individual. The condition was held void. While the case may be distinguished from in *Re Macleay*, *supra*, on the ground that the condition amounted to a general restraint upon alienation, yet Pearson, J., strongly criticises Jessel's views, using an argument which will be hereafter referred to. The American cases are equally uncertain. In *McWilliams v. Nisly*, 2 S. & R. 507, we find a dictum that a prohibition to alienate to a particular individual is good, while in *Anderson v. Cary*, 36 Ohio St. 506, a condition that the two sons who were devisees should not alienate except to each other was held invalid. As Pearson, J., said: "What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number

of individuals (not knowing at the present moment what the number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or if from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case."

But, as already urged, the difficulty of the problem is no reason why it should not be faced and solved by the courts. Holmes, J., in his Common Law, chap. 3, has pointed out with great clearness and force how, as the law imposes upon all the citizens the necessity of a knowledge of itself, so it should by degrees more exactly and accurately define for the benefit of its citizens those acts which have or may have attached to them legal penalties. Perhaps the most striking illustration of this function of the courts is the so-called "stop, look and listen" rule, so familiar to lawyers in Pennsylvania. What it means is that the law is now able to say to

man who is about to cross a railway track, instead of, as formerly, "You must take *due care*, and if the jury think you have been *negligent* you cannot in any event recover," now the law says, "You must *stop, look and listen*." In other words, the unsatisfactory, because indefinite, standard of reasonable care, involving the somewhat complex conception of a reasonable man, has been, in this class of cases, further defined in concrete language which even a child could understand—and the law is performing its function just so much more adequately than heretofore. Let us examine, therefore, how far public policy permits such partial restraints on alienation, remembering that even Pearson, J., concedes that they are permitted.

The only test suggested in the cases is that of Jessel, M. R., viz., "whether the condition takes away the whole power of

alienation substantially; it is a question of substance, and not of mere form." Pearson, J., while excepting to this principle, explains it admirably: "I apprehend that the meaning of the word 'substantially' is this: Does it really deprive the devisee of the power of alienation, or does it only so restrain it, that in effect he still has the power of alienation? If the latter, it is good." Conceding with Pearson, J., that the test is vague and difficult of application, still it is precisely the same question which arises in cases of building contracts, where the plaintiff, though failing in some particulars, is yet entitled to recover something if his contract has been substantially performed; substantial performance is difficult to define,—nay, one jury may consider that performance substantial which another would not so consider, but it is better for the doctrine to exist in its defective form rather than resort to the simpler but harsher rule of turning the plaintiff out of court if he has not lived up to the letter of his agreement. A more scientific and apparently very equitable principle is suggested by Professor Gray, "Restraints on Alienation," p. 41: "That a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but it is bad if it allows of alienation only to selected individuals or classes." This, of course, is not the law of England, since in *Re Macleay*, *supra*: but the few decisions in America are in accord with it, *Anderson v. Cary*, *supra*, *Gallinger v. Farlinger*, 6 U. C. C. P. 512, and it seems to afford a definite rule, by furnishing a plainly marked line which meets with the public's requirement that property shall on the whole be freely transferrable, and yet permits the grantor or testator to make an exception in the case of an objectionable individual, just as, he, of course, may make an exception against an objectionable use.<sup>1</sup>

<sup>1</sup> The Canadian cases follow the English rule: *Earls v. McAlpine*, 27 Grant's Ch. (U. C.) 161; *Smith v. Faught*, 45 U. C. Q. B. 484, *In re Winstanley*, 6 Ont. Rep. 315; *O'Sullivan v. Phelan*, 17 Ont. Rep. 732. The leading American case advocating the doctrine of the invalidity of all partial restraints on alienation is *Mandelbaum v. McDonnell*, 29 Mich. 78; accord *Bennett v. Chapin*, 77 Mich. 538; *Potter v. Couch*, 141 U. S. 314. Some Massachusetts cases favor the English rule: *Gray v. Blanchard*, 8 Pick. 284; *Blackstone Bank v. Davis*, 21 Pick. 43; *Simonds v. Simonds*,

The next question is how far the creator of an estate in fee may control the devolution of the estate upon the death of the tenant in fee; it is here assumed that the tenant may, if he choose, alienate the estate during his life, but the further consideration assumes that he has not done so. If not, may the creator either (a) deprive the tenant of the right to devise it altogether, or (b) conceding him the right to devise, provide that in case of his failure to devise, the estate shall pass, not under the intestate laws, but to persons designated by the creator, as upon an executory limitation? The two phases indicated will be considered together, as they are so treated in the cases, although the principles governing them may be found to be not identical. In *Ware v. Cann*, 10 B. & C. 433, a testator devised an estate in fee to A., with a proviso that if he died without heirs, or if he offered to mortgage, or suffer a fine or recovery of it, then over to B. The latter proviso, of course, is invalid, and the King's Bench must have thought the former equally so, for they sent a short certificate to the Chancery that A. could give a good title in fee simple. Like most such certificates, the decision is unsatisfactory because no reasons are given; but the case certainly denies the original testator's right to dispose of the estate in any way upon the death of the tenant, for obviously if this limitation was invalid, a condition impairing the power of the tenant in fee to devise would be so *a fortiori*—it is a much greater infringement of such tenant's ordinary privileges. Precisely the same question arose, and was similarly decided in *Holmes v. Godson*, 8 DeG. M. & G. 152, where Turner, L. J., said: "This is in terms a disposition of real estate in favor of other devisees in the event of a devisee in fee dying intestate; and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate, the estate shall go to his heir; 3 Met. 562. The similar early New York case of *Jackson v. Schutz*, 18 Johns. 184, was overruled in *De Peyster v. Michael*, 6 N. Y., 467. It may be noted that the parallel question of how long the power of alienation the power of alienation may be restricted has been fixed by statute in Michigan (2 How. Ann. Stat. § 5531) at "two lives in being at the creation of the estate." See *State v. Holmes*, 73 N. W. 548.

and this provision tends directly to contravene the law, and the policy on which it is founded." It will have been noticed that the reason assigned is the repugnancy—which we have already found not to be the true principle applicable to these cases; and when we advert to the proper test of public policy, it is by no means clear that public policy is injured by sustaining such conditions. Assuming that the owner in fee may not be restricted from alienating, assuming further for the moment (though we have not yet reached the cases) that the same policy will invalidate a clause prohibiting him from devising the land—yet his rights could hardly be affected by a proviso that, if he does not sell, and if he does not devise, then the estate shall go over; if he wants his heirs under the intestate laws to inherit in the proportions in which they would inherit under those laws, he may accomplish his purpose by making a will devising it to them in those proportions. The right to die intestate, so to speak, is a right whose very existence is questionable. While the law is probably settled by *Holmes v. Godson*, and subsequent cases, it is submitted that it is upon an illogical, or at any rate an inexpedient, foundation. *Shaw v. Ford*, 7 Chan. Div. 669, is a similar case, the proviso being in case the beneficiary died without issue—from which we may understand that the testator intended to deprive him of the power to devise—and, as intimated above, it may be readily admitted that such a condition would be against public policy. But no such distinction is taken by Fry, J., who in holding the gift over invalid stands squarely upon the cases cited: "*Prima facie*, and speaking generally, an estate given by will may be defeated upon the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise defeating or abridging an estate in fee, by altering the course of its devolution, which is to take effect at the moment of devolution, and at no other time, is bad." *Ross v. Ross*, 1 Jac. & W. 154, is to the same effect, and other cases might be cited, as *Kaiker's Appeal*, 60 Pa. 141, and *Fisher v. Wister*, 154 Pa. 65, where the whole learning on the subject is admirably reviewed by R. C. Dale,

Esq., Master, whose report in favor of the English rule was adopted by the Supreme Court. The only case involving the denial of the right to devise alone is *Doe d. Stevenson v. Glover*, 1 C. B. 448: a gift in fee was here made by a testator to his son A., with a proviso that if he should die without leaving issue, or if he should not have disposed and parted with his interest, then over to B. The son died without issue, but made a will. B. claimed against the will. It was held by the court that the executory devise to B. was valid; that the intention of the testator was that A. should have power to alienate in his lifetime only. "The son might have prevented the devise ever from taking effect, by disposing of the property in his lifetime. But in the event of his not exercising that power, the estate is given over and nothing remains for him to part with by his will." The case can hardly be regarded as binding. It is flatly opposed to the cases just cited, and on principle a prohibition to will lands would seem to be as objectionable as a prohibition against alienation.

We come finally to the consideration of the question how far the creator of an estate may exempt it from liability for the payment of the debts of its owner. In spite of the great conflict of authority on this point, some questions may be regarded as entirely well settled. The same public policy which requires that an owner in fee may alienate generally, also requires that his estate shall be liable for the payment of his debts. Nor does it matter whether the condition takes the form of a limitation over upon the insolvency or bankruptcy of the tenant, or executions issuing against him, or whether it consists simply of a clause providing that the estate in his hands shall be exempt from liability for his debts. In *Re Dugdale*, 38 Ch. Div. 176, is a good illustration of the first class of cases. A testatrix devised property to trustees, giving her son A. an equitable fee, and adding that if he should "do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime," then over. The court held that the executory gift over was bad, Kay, J. saying: "The events upon which the executory

devise in this case is to take effect seem to be (1) alienation, and (2) bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple be divested by an executory devise on that event? The liability of an estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A, were to declare that such an estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. *Peirce v. Roberts*, 1 M. & K, 4, is a case of the other class. A gift was made to trustees in trust to apply the income to the use of the testator's son, A. in such proportions, at such times and in such manner as the trustees should think best. A took the benefit of the Insolvent Debtor's Act, and it was held that his assignee was entitled to the fund: "The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment." But probably the best statement of public policy on this point is contained in the opinion in *Mebane v. Mebane*, 4 Ired. Eq. 131: there the testator had no hesitation in expressing his wish that his son's equitable fee should "not in any wise be subject to the debts" of the son. The estate was nevertheless held liable to the son's creditors, Ruffin, C. J., saying: "The doctrine rests upon these considerations: that a gift of the legal property in a thing includes the *jus disponendi*, and that a restriction on that right as a condition, is repugnant to the grant, and therefore void: And that, in a court of equity, a *cestui que* trust is looked on as the real



owner, and the trust governed in this respect by the same rules which govern legal interests; and, consequently, that it is equally repugnant to equitable ownership that the owner should not have the power of alienating his property. . . . That being so, it follows that the interest of the *cestui que* trust, whatever it may be, is liable in this court for his debts. For it would be a shame upon any system of law, if, through the medium of a trust of any kind of contrivance, property, from which a person is absolutely entitled to a comfortable, perhaps an affluent support, and over which he can exercise the highest right of property, namely, alienation, and which upon his death would undoubtedly be assets, should be shielded from the creditors of that person during his life. . . . Liability for debts ought to be, and is, just as much an incident of property as the *jus disponendi* is; for, indeed, it is one mode of exercising the power of disposition." The court fell into an error at the close of the opinion, through overlooking the distinction which has grown up in this particular between estates in fee simple and life estates: "The only manner in which creditors can be excluded is to exclude the debtor also from all benefit from, or interest in, the property, by such a limitation, upon the contingency of his bankruptcy or insolvency, as will determine his interest, and make it go to some other person." Not only is this generally true, but even in states like Pennsylvania, where spendthrift trusts are recognized as to equitable life interests, it seems to be conceded that equitable fees are liable to creditors: *Keyser's Ap.*, 57 Pa. 236. *Beck's Est.*, 133 Pa. 51, indeed goes so far as to hold valid a condition that a legacy shall not be attachable in the hands of the executor, and *Barker's Est.*, 159 Pa. 518, holds that a spendthrift trust clause is valid to protect the interest of an equitable tenant in fee until his right to possession accrues (thus coming pretty close to the holding that an equitable fee may be protected by a spendthrift trust clause). But the latter case expressly recognizes the authority of *Keyser's Ap.*, *supra*, and therefore it may be confidently asserted that even in Pennsylvania the general rule still prevails.

Turning to the lesser estate for life, we again find that a distinction has been taken between a gift for life with a limita-

tion or condition that upon the insolvency of the life tenant the estate shall go over or revert (where the condition or limitation has been held valid) and a gift for life with a proviso that the estate in the life tenant's hands shall not be liable for his debts, when the proviso (so far as legal life estates are concerned) has universally been held bad. An illustration of the first class is *Lockyer v. Savage*, 2 Stra. 947. Here an estate was given to trustees for the use of A. for life, and if he failed, then for the use of his wife and children. The gift over was held good, the court comparing it to the case of a lease in which the tenant is prohibited from assigning his interest, and thinking that creditors should not complain, because the donor may give to the bankrupt on what terms he chooses. The same principle was acted on in *Dommett v. Bedford*, 6 T. R. 684, and in a long opinion by Turner, V. C., in *Rochford v. Hackman*, 9 Hare, 475, where Lord Eldon's opinion in *Brandon v. Robinson*, 18 Ves. 429, is relied on as establishing the distinction between this and the latter class of cases. It is conceded, however, that a man may not settle his own property upon himself for life with a limitation over in the event of his own insolvency. This was first intimated in *Higinbotham v. Holme*, 19 Ves. 88 (which, however, partly turned upon the question of actual fraud), and was expressly decided in *Lester v. Garland*, 5 Sim. 205. See also *Synge v. Synge*, 4 Ir. Ch. 337. Of the latter group of cases, *Graves v. Dolphin*, 1 Sim. 66, is perhaps the earliest example; a proviso that an annuity should be exempt from liability for the annuitant's debts was held void. The law is well settled: *Youngehusband v. Gis orne*, 1 Coll. 400; and applies even where a trust is created, if the *cestui que* trust is also trustee, so that he has the legal title: *Hahn v. Hutchinson*, 159 Pa. 133; *Ehrisman v. Sener*, 162 Pa. 577.

It is of course too late, except by legislative enactment, to alter so well-settled a distinction, and yet it seems on principle very questionable whether such a distinction is well founded. It would seem much more consistent and logical for those courts which sustain spendthrift trusts to hold that, as the policy of the law is not opposed to a life tenant holding his property free from his debts, not only is a gift ever con-

ditional upon his insolvency valid (*Rochford v. Hackman, supra*), but that a direct legal estate for life might equally be made exempt from liability for debts: why should public policy insist upon the formality of a trust? On the other hand, it would seem that these courts which condemn spendthrift trusts, should not only condemn a clause exempting a legal life estate from liability for debts (*Graves v. Dolphin, supra*), but also should hold invalid a clause providing for a gift over upon the life tenant's becoming insolvent—just as they of course would hold invalid a clause providing for a gift over in favor of the criminal upon the life tenant's being murdered; in the latter case they would not hesitate to subordinate the testator's wishes to considerations of public policy—why should they in the former, and thus allow their aversion of spendthrift trusts to be evaded, by simply providing that, upon the life tenant's insolvency, the estate shall vest in (say) his wife and children? The very fact that according to all the decisions a man may not create a life estate for himself determinable upon his insolvency (*Lester v. Garland, supra*), is a strong argument in favor of this view; leaving actual fraud out of the case, and assuming that the man is amply justified in laying aside a given sum of money, why should he not be permitted to treat it the same as a stranger? If he may give it away absolutely, as of course he may, why may he not do the less harmful act, so far as his creditors are concerned, of reserving an equitable life interest for himself, and if he may do so, why may not (fraud again excepted) that life interest be determinable upon the same event which would terminate his life interest created by a stranger? In fact, the futility of the distinction is proven by the fact that, in the illustration just suggested, the man of means might make a gift outright to a friend, and the friend might immediately settle the same sum upon trustees, giving the donor a life estate determinable upon his insolvency; what merit has a distinction that could be so readily evaded?

These considerations lead us naturally to the much discussed problem whether, admitting that an equitable fee may not be exempted from liability, admitting likewise that a legal life estate may not be so exempted, admitting finally that the or-

dinary equitable life estate is not so exempted, yet may an equitable life estate be created in such a way that because of the creator's expressed wish, the life tenant may hold the estate free from such liability? It is not proposed to narrate the conflicting views on this subject. Every lawyer knows that such trusts are not sustained in England, and in many of our states. *Tillinghast v. Bradford*, 5 R. I. 205, is often cited as the leading case in support of this view. The court said: "Such restraints are so opposed to the nature of property—and so far as subjectedness to debts is concerned, to the honest policy of the law,—as to be totally void." Every lawyer knows, too, that the decisions supporting spendthrift trusts originated in Pennsylvania in *Fisher v. Taylor*, 2 Rawle 33, and that the doctrine, though endangered for awhile (*Overman's Appeal*, 88 Pa. 276), is now well settled, not only in Pennsylvania, but in many other states, including Massachusetts (where the important case of *Broadway Bank v. Adams*, 133 Mass. 170 did much to establish the doctrine), and that the Supreme Court of the United States even went out of its way to express its adherence to the so-called American doctrine (Miller, J's opinion in *Nichols v. Eaton*, 91 U. S. 716). Professor Gray's "Restraints on Alienation," written, as the author says, for the express purpose of combatting spendthrift trusts, so far from accomplishing its purpose, seems simply to mark a period of their new activity. It is proposed simply to examine the various arguments that have been adduced for or against them.

It is hoped that enough has been said to show that repugnancy has nothing to do with the question,—that it is simply one of public policy. It should be further borne in mind that public policy has universally decided against permitting estates in fee simple, whether legal or equitable, to be held free from liability for the owner's debts, and that the same rule universally exists with respect to legal life estates; the only question is as to equitable life estates. The earliest argument in favor of such spendthrift trusts is found in *Fisher v. Taylor*, 2 Rawle 33. Smith, J., said: "A different construction would make the beneficial interest, which the testator intended to provide for his son, subject to be sold for his debts, when he expressly

declared that it should not be so subject, and would thus set up a new will in place of that which it affected to interpret." In other words, the testator's wishes must be respected; and this argument has been reiterated through the cases. It would be an affectation to cite cases to show, however, that when you have determined the testator's intention, you have simply reached the difficulty, not solved it; of course, the testator's intention must be disregarded wherever it comes in conflict with the policy of the law. The fact that, in spite of the testator's intention, an equitable fee is always liable for the owner's debts is conclusive upon this point. Abandoning this ground, the supporters of spendthrift trusts next argue that creditors are the only persons who can complain, and they may not because they have constructive notice through the recording of wills and deeds of the terms of such trusts, and should not give credit upon the faith of such estates: Miller, J., elaborates the argument at length in *Nichols v. Eaton*, *supra*, and relies upon the analogy of exemption laws which exist in every State. And Morton, C. J., in *Broadway Bank v. Adams*, *supra*, adds: "There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy." It may be remarked, in passing, that so far from proving that spendthrift trusts are valid, C. J. Morton's view is a valuable argument in favor of the position advanced above that estates terminating upon insolvency should be held invalid just like estates attempted to be created free from liability for the owner's debts. But reverting to Justice Miller's proposition, we must take issue with both branches of it and deny (1) that the public has always constructive notice of the terms of such trusts; and (2) that the *cestui que* trust's creditors are the only persons who may complain of spendthrift trusts. As to the first, while it must be conceded under the laws of the various States, that both wills and deeds of real estate are bound to be registered, where the public may examine them, yet there is no such requirement with respect

to deeds of personalty ; and it is a well-known fact that many spendthrift trusts are created of personalty by deed *inter vivos*. It is not true, therefore, that the creditor may always protect himself. Passing this point, however, and assuming for the sake of argument that all creditors have constructive notice of all such trusts, we come to the much more important denial that the creditors are the only persons who may complain. The community as a whole is much interested in the question whether a man may be allowed to enjoy property without subjecting it to liability for his debts : what is the natural tendency of such spendthrift trusts ? Is it not to encourage in the beneficiary a feeling of irresponsibility—a feeling that the property is being cared for by a presumably competent trustee, and that he need not only give it no attention but if the income is sufficient, live in idleness and luxury, knowing that as long as he lives he will be comfortably supported ? The difference between this and the ordinary trust estate is obvious—in the latter the beneficiary's interest is as liable to execution, principal and income, as if it were in his own hands. Suppose any considerable part of the trust funds of the country were so safeguarded, does any one doubt that the result would appear in an incompetent and lazy generation ? And, if so, who would weigh for a moment the wishes of the creator of the trust as against the interests of the community ? These arguments have a special weight at the present time. For what is the essence of the vague, but rapidly growing, feeling against "trusts," so-called ? Is it not that they permit capital to influence and interfere with the rights of liberty, as understood by the Anglo Saxon race ? And is the right to compel a man to yield up his possessions for the payment of his debts at all less inherent and less valuable, than the right to trade unrestricted by anything except by natural competition ? If conferences are held and political parties forming, to assert the latter right, may we not feel confident that they will likewise attack the former ? Let our courts beware lest unconsciously in sustaining spendthrift trusts they may be creating another bone of contention in the impending controversy between labor and capital, rich and poor.

The writer does not lay claim to any originality of re-

search in this paper. He will be quite satisfied if he shall have demonstrated that the questions discussed herein are all not questions of repugnancy at all, but questions of public policy, and therefore to be resolved by the courts, not upon strict logical analysis and deduction, but upon a consideration of the ultimate highest good of the community.

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